Supreme Court, U. S.
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No. 80-866

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

WILLIAM ARNOLD HAYS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW.

I. Has the Sixth Circuit Court of Appeals improperly construed the scope of the Hobbs Act (18 U.S.C. § 1951-2) so as to deny the petitioner certain fundamental guarantees by rejecting a distinction between bribery and extortion under color of right and inferring an element of the crime from the status of the defendant?

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NO.

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1980

WILLIAM ARNOLD HAYS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

William Arnold Hays petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause October 2, 1980.

OPINIONS BELOW.

The judgment of the Court of Appeals was rendered October 2, 1980 with a brief opinion.

A copy of the order is made Appendix A. No opinion was rendered by the district court.

JURISDICTION.

The judgment of the court of appeals was entered October 2, 1980, and the petition is being filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner was convicted of a violation of 18 U.S.C. § 1952, which provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physicial violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

(b) As used in this section -

***

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall ... be deprived of life or liberty, or property, without due process of law..."

STATEMENT OF THE CASE.

Petitioner William Arnold Hays was indicted on seven counts of obtaining monies under color of official right on seven different occasions from two persons, in violation of 18 U.S.C. § 1951 (the Hobbs Act).

The petitioner occupied an executive position in Shelby County, Tennessee government. The foundations of all counts in the indictment are theorhetically identical. The thrust of the charges was that the petitioner,

through his position, manipulated the contract bid system through which county business was done or used his position to advance priorities in land acquisition by the county for road building.

The Government maintained that certain parties made payments to the petitioner as a result of the petitioner's manipulations, said payments focusing on the petitioner's position as an executive in county government.

The jury convicted the petitioner only as to six of the seven counts of the Indictment. The proof consisted mainly of the testimony of a former county executive who was an unindicted aider and abettor as to two counts and two businessmen who testified they made payments either to the petitioner or persons who were to forward the monies to the petitioner.

The petitioner was found guilty as to Count I of the Indictment of obtaining $4,500.00 from James Edward Hockaday whose company had subcontracted defoliant chemical

spraying work from the company which had been the successful bidder through the county's contract bid system. Hockaday testified that he made this payment in cash to the petitioner in the petitioner's car.

As to Count II, the petitioner was found to have received, along with one James L. Butler, $2,500.00 from Hockaday. Hockaday's company had been the successful bidder on the sale of certain equipment to the Shelby County government.

As to Count III, the petitioner was found guilty of receiving $1,250.00 from Hockaday. Again Hockaday's company had successfully bid for the sale of certain equipment to the county.

As to these three counts Hockaday's testimony was consistently that the bid system was manipulated so that his company or in Count I, a company with whom he had arranged to subcontract, would be the successful bidder. Hockaday further testified that these payments were kick-

backs or pay-offs arising out of the bids.

The petitioner was acquitted as to Count IV.

The petitioner was found guilty as to Count V consisting of the receiving of $3,750.00 from Hockaday. A company owned by Hockaday and one Jerry Lucas was the successful bidder on a tree-trimming contract. Hockaday's testimony was that he paid the $3,750.00 to Lucas to give to the petitioner. This $3,750.00 was said to have constituted Hockaday's one-half contribution to the pay-off due on the contract. Lucas refused to testify at the trial, invoking the Fifth Amendment privilege. Hockaday testified that he did not know whether or not the petitioner ever received the money but did state that he felt he had to make the payment to do business with the county.

The petitioner was found guilty as to Counts VI and VII which are separate payments arising out of the same event. A

property developer, Cary Whitehead, testified that as a result of the advancement of the priority of a road through land owned by him, he made two separate payments to the petitioner.

Whitehead testified that he made an $1,800.00 payment to the petitioner personally. He then testified that he paid $8,000.00 to one James Cole who did not testify at the trial for delivery to the petitioner. These two payments constituted Counts VI and VII of the Indictment.

The petitioner testified in his own defense and denied that he received any monies whatsoever.

The trial was held in the federal district court for Western District of Tennessee pursuant to the jurisdiction vested in that court by 18 U.S.C. §3231.

The testimony at the trial was lengthy and complicated, consisting in great part of the procedures and politics of Shelby County government. Myriad Matters seemingly unre-

lated to the charges in the indictment were also made a part of the testimony.

The petitioner has limited his reference here to those events bearing directly on the transactions in which the defendant is said to have been the recipient of a payment.

ARGUMENT.

I. The conduct of the petitioner was such as to constitute the passive acceptance of a bribe, an offense not properly within the scope of the Hobbs Act.

In the criminal law there exist certain fundamental precepts:

(1) That conduct which is to be declared criminal will be clearly defined by statute. U.S. Const., Art. I, §9, 10, and

(2) That in the federal criminal law, there are no common law crimes, United States v. Hudson and Goodwin, 11 U.S. (7Cranch.) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); Krulewitch v. United States, 336 U.S. 440 (1949); and

(3) That when the legislature "borrows terms of art in which are accumulated legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word

in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." Morrisette v. United States, 342 U.S. 246, 263 (1950).

The petitioner would direct the attention of the Court to that portion of Hobbs Act where the term "extortion" is defined, 18 U.S.C. §1951 (2). The petitioner was convicted of extortion, the obtaining of property from another, with his consent, "under color of official right." The term "under color of official right" carries a technical meaning which is descriptive of a certain type of conduct and does not reach the passive acceptance of a bribe.

"Under color of official right" is essentially ambiguous and overbroad until the court construes and defines the term in accordance with the rules of construction. The sixth circuit court of appeals has addressed the meaning of the term as used in the Hobbs Act in United States v. Harding, 563 F.

2d 299 (6th Cir. 1977) and elaborated on the scope of the term in United States v. Butler, 618 F. 2d 411 (6th Cir. 1980).

The petitioner urges that the interpretation set out in the Harding and Butler cases criminalizes conduct not specifically proscribed by statute and, therefore, denies a defendant charged thereunder his right to procedural due process, U.S. Const., 5th amend.

The petitioner asserts that extortion under color of official right does not reach acceptance of a bribe as the sixth circuit has determined. The petitioner asserts that the sixth circuit has reached such a conclusion in derogation of fundamental constitutional guarantees and by so doing has usurped the function of the legislature. It is not disputed that congress adopted the common law meaning of extortion in the Hobbs Act.

A. THE COMMON LAW ORIGINS

Bribery is defined as "the voluntary giving or offering to, or the acceptance by, any public officer or official, of any sum

of money, present, or thing of value, to influence such officer or official in the performance of any official duty required of him, or to incline him to act contrary to known rules of honesty and integrity." 11 C.J. S., Bribery, § 1, p. 840.

(I)n the common law, the term extortion has acquired a technical meaning and designates a crime committed by an officer of the law who, under cover or color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due.

35 C.J.S. Extortion, § 1, p. 355. Similarly, 31 Am Jur 2d Extortion, Blackmail, Etc., § 1, p. 900, similarly, United States v. Laudini, 134 F. 2d 847, 850, n.1. (3rd Cir. 1943).

Discussions of extortion as a common law crime as found in the legal treatises consistently speak in terms of affirmative action on the part of the official: "An officer who demands fees not allowed by law is ... guilty of extortion," 35 C.J.S. Extortion, §2, p. 358;

"It is extortion at common law for an officer to take more than the prescribed amount ....," Id. (emphasis supplied).

The petitioner urges that the "taking" element of the offense of extortion requires an affirmative inducement on the part of the official.

The sum alleged to have extorted must have been demanded as a fee for some official duty, and must have been demanded of a person liable therefor; fees voluntarily paid by a person not liable, although improperly and unjustly taken, are not obtained by color of office.

35 C.J.S. Extortion, § 15 b. (1), p. 370 (emphasis supplied).

It has also been stated that the person paying "must have yeilded to official authority," 31 Am Jur 2d §4, p. 903, and that "no extortion is committed by an officer who receives ... a voluntary payment of a fee where noting is due." Id. at §5, p. 90. The petitioner urges that the language of 18 U.S.C. §1951 is not

so worded as to encompass the acceptance of voluntary payments but rather adopts the common law definition of extortion which does not criminalize the acceptance of voluntary payments.

B. The Interpretation of the Hobbs Act by the Court of Appeals for the Sixth Circuit

The petitioner will address his argument to the reasoning and conclusions of the sixth circuit court of appeals in United States v. Harding, 563 F. 2d 299 (6th Cir. 1977) and United States v. Butler, 618 F. 2d 411 (6th Cir. 1980).

The petitioner urges that the court's reliance is misplaced and results in the judicial creation of a crime.

In Harding the defendant was convicted of extortion under facts which showed that the defendant sold the questions and answers to a licensing examination administered by the state real estate commission. The defendant contended that such conduct did not constitute extortion under the Hobbs Act.

The court first looked to the Hobbs Act

definition of extortion: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951. The court then reviewed the legislative history of the act. The thrust of the act was aimed at outlawing the use of force or violence, actual or threatened, to affect interstate commerce, particularly in labor union activities. Nothing in the legislative history indicates that when the term "color of official right" was included in the statute, anything other than its common law definition was intended. 563 F 2d. 299, 302-04.

For some time there existed confusion among the courts as to whether or not extortion under color of official right required an additional element of force or duress. This issue was eventually resolved by the courts to the effect that the additional element of force or fear was not required in

instances of extortion under color of official. 563 F. 2d 299, 305.

The court goes on, however, to rely on certain of these cases for the determination that extortion and bribery are not mutually exclusive. The petitioner argues the court's reliance is misplaced.

The court acknowledged the common law definition of extortion, 563 F. 2d 299, 304, and that its incorporation into modern statutory definitions of extortion which included an element of force, fear, or duress created some confusion. The court determined that "(t) he common law understanding of extortion ..... does not require this distinction between extortion and bribery." Id.

The petitioner argues that the common law meaning of the term extortion is clear and did indeed distinguish between bribery and extortion. The court had acknowledged in its review of the legislative history of the Hobbs Act that the languages of Hobbs Act was substantially identical to that of the New York state extortion

statute. Id.

The court recognized that the leading New York case on extortion held that bribery and extortion are mutually exclusive, focusing on the duress requirement of extortion versus the voluntariness of a bribe. Id., citing People v. Dioguardi, 8 N.Y. 2d 260, 203 N.Y.S. 2d 870, 168 N.E. 2d 683 (1960), The court indicated that this New York case was considered the source of confusion as to whether not extortion under color of right involved an element of duress. This point of confusion has since been resolved, 563 F. 2d 299, 305, but petitioner argues the Dioguardi fundamental distinction between extortion and bribery remains viable.

The Sixth Circuit went on to review those cases which in interpreting the scope of the Hobbs Act extortion under color of official right rejected any distinction between bribery and extortion.

The petitioner would show to the Court that in each of those cases relied on by the

Sixth Circuit in Harding as rejecting any distinction in bribery and extortion there exists a fundamental weakness.

The court relies first on the holding of Unites States v. Braasch, 505 F. 2d 139 (7th Cir. 1974). Cert. denied 421 U.S. 901 (1975). The Sixth Circuit noted that the issue in Braasch was whether or not force or duress was an element of extortion under color of official right, but found that the Braasch court rejected the bribery / extortion distinction. United States v. Harding, 563 F. 2d 299, 305 (6th Cir. 1977).

The petitioner urges that a careful reading of the Braasch opinion reveals the following. The defendant in Braasch were police officers who had actively used their official position to harass liquor establishments and business owners had paid the defendants to stop, a protection pay-off scheme - United States v. Braasch, 505 F. 2d 139 (7th Cir.1974), cert. denied 421 U.S. 910 (1975).

The defendants urged their conduct was acceptance of a bribe and not common law extortion. The court found, however, that the conduct of the defendants was within the ambit of common law extortion in that the officers used the authority and power of their office to obtain money not due the office or the officers. Id. at 151. The court went on to point out that the use of public office to obtain payments was the crux of the violation and that the focusing of the payor's motivation on the recipient's office caused the conduct to "fall within the ambit of 18 U.S.C. § 1951." Id. The court then stated: "That such conduct may also constitute 'classic bribery" is not a relevant consideration." Id.

The petitioner would argue to the Court that indeed whether or not the activity of the defendants was bribery was not a relevant consideration. The defendants in Braasch engaged in a course of conduct which was

"classic extortion", the active misuse of office to obtain money not due the office or officer. The defendants were not the passive recipients of a bribe.

The Sixth Circuit seized upon the Braasch court's statement that "such conduct may also constitute 'classic bribery' is not a relevant consideration" as standing for the rejection of a bribery / extortion distinction. United States v. Harding, 563 F 2d 299, 305 (6th Cir. 1977).

In setting out the holding of the Braasch court, the Sixth Circuit included footnote 7 to the court's opinion. Id. Footnote 7 read: "As appellants themselves point out, 'the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Act are not mutually exclussive.'" United States v. Braasch, 505 F 2d 139, 151 fn.7, (7th Cir. 1974), relied upon in United States v. Harding, 563 F 2d 299, 305 (6th Cir. 1977).

The authority relied upon in this footnote was United States v. Kahn, 472 F.2d 272, 278 (2nd Cir. 1973), Cert. denied 411 U.S. 982. But in Kahn the court was considering if extortion was an absolute defense to a bribery charge grounded in state law. the court noted that New York state law specifically provided that extortion was an absolute defense to a bribery charge, but that the explicitness of New York could not be read into Pennsylvania law, the law under consideration by the court. Id.at 278. The court went on to hold that proof of extortion is relevant on the issues of intent and willfulness with regard to a charge of bribery. Id. It was in the context of court reached the apparent conclusion that bribery and extortion are not mutually exclusive.

The apparent result has been picked up other courts as a basis for the proposition that activity which constitutes extortion is not mutually exclusive of activity which

constitutes extortion and as such may form the basis for a conviction under the Hobbs Act. United States v. Hathaway, 534 F. 2d 386, 394 (1st Cir. 1976), Cert. denied 429 U.S. 819 (1977); United States v. Braasch, 505 F. 2d 139, 151 fn. 7, (7th Cir. 1974), Cert. denied 421 U.S. 910 (1975); United States v. Hall, 536 F. 2d 313, 321 (10th Cir. 1976), Cert. denied 429 U.S. 919 (1976).

The greatest tragedy of this reliance is that the Kahn case did not even involve a prosecution under the Hobbs Act, but rather involved a prosecution under the Travel Act, 18 U.S.C. § 1952, making it a crime to use an interstate facility to violate state law, including state laws against bribery. United States v. Kahn, 472 F. 2d 272, 277 (2nd Cir. 1973).

The Sixth Circuit then went on to rely on the case of United States v. Mazzei, 521 F. 2d 639 (3rd Cir. 1975), Cert. denied 423 U.S. 1014 (1975), as serving as the renunciation of a prior recognition of a distinctio

between bribery and extortion articulated in United States v. Addonizio, 451 F. 2d 49 (3rd Cir. 1971). Cert. denied 405 U.S. 936 (1971). The Sixth Circuit stated, "(T)he Third Circuit distinguished its own precedent in United States v. Addonizio .... and held that '(a)ny element of coercion that may be required to establish extortion under the Hobbs Act is supplied by the misuse of the defendant's official power.'" United States v. Harding, 563 F. 2d 299, 305-6 (6th Cir. 1977).

The petitioner asserts that this statement baldly does not accurately reflect the distinction between Addonizio and Mazzei. In Addonizio the Third Circuit in considering whether or not a contractor's kickback scheme formed the basis for extortion, noted the New York courts; distinction between bribery and extortion: "(W)hile bribery was a voluntary payment made in order to exert undue influence on the performance of an official duty, extortion involves payment in return for

something to which the payor is already entitled. In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." 451 F. 2d 49, 72 (93rd Cir. 1971), citing Horstein v. Paramount Pictures, 22 Misc. 2nd 966, 37 N.Y.S. 2nd 404 (1924). The court in Addonizio went on to find a lack of voluntariness in the payments made but did not discount the distinction in bribery and extortion.

In United States v. Mazzei, 521 F. 2d 639 (3rd Cir. 1975). the defendant at the court of appeals urged that a Hobbs Act conviction resting on the obtaining of money "under color of official right" required a showing of coercion on the part of the official. The defendant relied upon the court's statements in Addonizio that "while the essence of bribery is voluntariness, the essence of extortion is duress." Id. at 644.

The defendant in Mazzei was a state senator who actively and personally approached the payor about the state's leasing premises from him and informed the payor that a

"contribution" was customary. Id. at 641. The Third Circuit in Mazzei stated it did not "agree" with the defendant's contention and held that if a violation of Hobbs Act based under "color or official right" required any showing of coercion on the part of the official, the element of coercion" is supplied by the misuse of the defendant's official power." Id.

The petitioner would show to the Court that the language of the Mazzei court is a reflection of the confusion that once prevailed among the court as to whether coercion was an element of extortion under color of official right. The Third Circuit's language does not reflect a disregard for the distinction between bribery and extortion nor does it distinguish the holdings of Addonizio, as the Sixth Circuit suggests. United States v. Harding, 563 F. 2d 299, 305-6 (6th Cir. 1977).

The Sixth Circuit next relied on the case of United States v. Hathaway, 534, F. 2d 386 (1st Cir. 1976), Cert. denied 429 U.S. 819

(1977). The defendants in Hathaway urged that extortion under color of official right as a violation of the Hobbs Act required actual or threatened force or violence and that their activity constituted bribery. Id. at 393-4. The court held that the Hobbs Act language adopted the common law meaning of extortion. The court adopted the Third Circuit's approach in Mazzei that if force or coercion as generally contemplated by statutory extortion is required, then the misuse of public office supplies that element. Id. at 393.

The Sixth Circuit set out the holding of United States v. Hathaway as to the coercive element of extortion under color of official right, then stated, "The (First Circuit) went on to note that bribery and extortion as used in Hobbs Act are not mutually exclusive." United States v. Harding, 563 F. 2d 299, 306 (6th Cir. 1977).

The petitioner would show that the Hathaway court actually stated merely in

dicta, "We agree, however, with recent federal decisions indicating that bribery and extortion as used in the Hobbs Act are not mutually exclusive." United States v. Hathaway, 534 F. 2d 386, 394 (1st Cir. 1975). The Hathaway court relied on United States v. Braasch, 505 F. 2d 139 (7th Cir. 1974), and United States v. Kahn, 472 F. 2d 272 (2nd Cir. 1972), which have been addressed and distinguished as unsound for that proposition earlier in the petitioner's argument.

The Sixth Circuit noted that the court in United States v. Hall, 563 F. 2d 313 (10th Cir. 1976) made findings similar to those of the Hathaway court. The Hall court stated, "We disagree with the argument advanced that bribery and extortion are mutually exclusive. To be sure they are distinct crimes .... It cannot be said that in a bribery case there is never an aspect of coercion on the part of the bribee." Id. at 321. The Hall court relied on United States

v. Addonizio, United States v. Hyde, United States v. Kahn, and United States v. Braasch, all of which have been set out in petitioner's argument previously except the case of United States v. Hyde.

In United States v. Hyde, 448 F 2d 815 (5th Cir. 1971), Cert. denied 404 U.S. 1058 (1972), the court continued to recognize a distinction between bribery and extortion. Speaking of extortion, the court said: "The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim." Id. at 833.

The Sixth Circuit in Harding drew on all these cases as standing for the proposition that under the Hobbs Act there is no distinction between bribery and extortion. The rejection of a distinction is amplified the court's apparent adoption of the proposition that if involuntariness is the essence of extortion, then the focusing of the payor's motivation on the payee's office makes

out a case of extortion. United States v. Harding, 563 F. 2d 299, 307 (6th Cir. 1977).

The Sixth Circuit unequivocally diregarded any distinction between bribery and extortion in United States v. Butler, 618 F. 2d 411 (6th Cir. 1980), Cert. denied 49 U.S.L.W. 3245 (1980). Relying on its earlier analysis in United States v. Harding, the Sixth Circuit stated: "In light of an almost unanimous holding by the circuits that bribery and extortion are mutually exclusive, we hold that any wrongful use of a public official's power for private personal gain is proscribed by the Hobbs Act." Id. at 419.

In addition to its reliance on Harding, the Sixth Circuit stated that its interpretation in Harding and Butler was supported by this Courts "broad" interpretation of extortion in United States v. Nardello, 393 U.S. 286 (1969). The Sixth Circuit relied upon this Court's statement:

At common law a public official who under color of office obtained the property of another

not due either to the office or official was guilty of extortion. In many states, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by meand of force, fear or duress. United States v. Butler, 618 F. 2d 411, 418 (6th Cir. 1980), citing United States v. Nardello, 393 U.S. 286, 289 (1969).

The petitioner respectfully states that the remark of this Court is not a "broad interpretation", as relied on by the Sixth Circuit, but is merely a reflection of the status of law.

The Sixth Circuit relied on its analysis in Harding and the "broad interpretaion" of this Court to arrive at the conclusion that:

On this analysis, the legal significance of the distinction between a public official taking a bribe and public official taking valuables under threat (common law extortion) is diminished. The 'coercive' element on the part of the official, and the 'duress' or

'fear' element on the part of the 'victim' are implied from the public official's position of authority over the victim.

United States v. Butler, 618 F. 2d 411, 418 (6th Cir. 1980).

The petitioner respectfully argues that the result of the Sixth Circuit's interpretation is the judicial creation of a new hybrid crime. The court has ignored the common law foundation of extortion as used in Hobbs Act.

Instead it has added a new element to the crime, implied this new element from the status of the defendant, and incorporated a separate crime into the reach of the Hobbs Act.

The court has achieved this by inferring that whenever an individual makes a payment to a public official and the motivation for such payment focuses on the office of the payee, there is no voluntariness on the part of the payor.

By so presuming, the court has, for all practical purposes, done away with the defense of bribery to the crime of extortion. The

court has effectively incorporated the crime of bribery into the crime of extortion. In so doing the court has also made a victim of the person who initites the bribe, therefore, immunizing from prosecution one who might rightfully be a defendant.

The petitioner asserts that under a proper, constitutional interpretation of the Hobbs Act, his conviction in the trial court should have been set aside.

CONCLUSION.

The petitioner would show that the foregoing establishes that the lower court has departed from accepted and usual course of judicial proceedings and prays that this Court exercise its power of supervision and issue the writ of certiorari.

RESPECTFULLY SUBMITTED,

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A P P E N D I X

80-5016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

V.

WILLIAM ARNOLD HAYS,

Defendant- Appellant.

_____/

Before: ENGEL and MERRITT, Cicuit Judges, and

GUY, District Judge+

The defendant William Arnold Hays appeals from a judgment of conviction following a verdict of guilty of extortion under the Hobbs Act, 18 U.S.C. § 1951-1952. His principal assignment of error is his claim that the conduct proved, at best, that he was guilty of accepting a bribe, an offense not within the proper scope

+ Hon. Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

of the Hobbs Act. Hays' assertion in this regard has been previously considered by this court and decided adverse to his claim in the companion case of United States v. Butler, 618 F.2d 411 (6th Cir. 1980).

Hays also asserts that the district court erred when it failed to declare a mistrial after learning that a juror had failed to disclose on voir dire that her nephew was prosecutor for the City of Memphis. Defendant also claims that the court erred in permitting the use before the jury of charts which were confusing and misleading; that it erred in overruling defendant's motion for a directed verdict of acquittal as to counts 5 and 7 of the indictment; and further, that it erred in its instructions to the jury as to the elements of a violation of the Hobbs Act.

Upon consideration, the court is of the opinion that appellant's claims of error are without merit. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE

COURT

/s/ John P. Hehman

Clerk

Issued as mandate: October 24, 1980

Costs: None

CERTIFICATE OF SERVICE

I, Frank C. Holloman, Jr., Attorney for the petitioner, William Arnold Hays, do hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed on behalf of William Arnold Hays by depositing same in a United States post office or mailbox, with first-class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the _____ day of _____, 1980.

_____

Frank C. Holloman, Jr.

No. 80-866

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ARNOLD HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Petitioner contends that the court of appeals has improperly construed the Hobbs Act, 18 U.S.C. 1951, to encompass conduct that constitutes bribery rather than extortion.

1. Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on six counts of unlawfully obtaining money under color of official right, in violation of 18 U.S.C. 1951. He was sentenced to 18 months' imprisonment and a $5,000 fine.

Petitioner was a high ranking official with the county government of Shelby County, Tennessee. The evidence at trial showed that he received money from two local businessmen in connection with contracts between the businessmen and the county government. He received a total of

some $12,000 in "kickbacks" from James Edward Hockaday in connection with four contracts obtained by Hockaday (Counts I-III, V). He also received approximately $10,000 from a local real estate developer in two separate payments, in connection with an arrangement under which the developer received priority on a road project that went through land he owned (Counts VI-VII) (Pet. 3-7).[1]

Two other Shelby County officials were convicted in connection with the same kickback scheme. The court of appeals affirmed these convictions in a thorough opinion (*United States* v. *Butler*, 618 F. 2d 411 (6th Cir. 1980)), and this Court subsequently declined to review that decision (No. 79-6479, cert. denied (June 16, 1980), and No. 80-5678, cert. denied (Jan. 12, 1981)). Relying on its decision in the *Butler* case, the court of appeals affirmed petitioner's conviction by order (Pet. App. 1-3).

2. Petitioner raises the same issue that was raised by the defendants in the *Butler* case: whether the Hobbs Act, 18 U.S.C. 1951, applies to the "passive" receipt of funds by public officials when the receipt of funds is not accompanied by force, threats of force, or express official coercion. That conduct, petitioner contends, constitutes acceptance of a bribe, not "extortion", and it therefore does not fall within the reach of Section 1951.

Precisely the same claim was raised by Butler and Hyden in petitioner's companion case, *United States* v. *Butler*, *supra*. Both Butler and Hyden raised the issue before this Court, and the Court denied certiorari in both cases. *Butler* v. *United States*, No. 79-6479 (June 16, 1980); *Hyden* v. *United States*, No. 80-5678 (Jan. 12, 1981). See also *French* v. *United States*, No. 80-479 (Nov. 3, 1980); *Cerilli* v. *United*

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[1]The evidence showed that the developer made an $1,800 payment directly to petitioner and an $8,000 payment to an intermediary for delivery to petitioner (Pet. 7).

States, 444 U.S. 1043 (1980); *Trotta* v. *United States*, 425 U.S. 971 (1976); *Mazzei* v. *United States*, 423 U.S. 1014 (1975); *Braasch* v. *United States*, 421 U.S. 910 (1975). For the reasons stated in our briefs in opposition to petitions for a writ of certiorari in those cases,[2] we submit that certiorari should be denied here as well.

The courts of appeals have unanimously rejected the construction of the Hobbs Act for which petitioner contends. See, *e.g.*, *United States* v. *Hedman*, 630 F. 2d 1184, 1194-1195 (7th Cir. 1980); *United States* v. *French*, 628 F. 2d 1069, 1071-1075 (8th Cir. 1980), cert. denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Williams*, 621 F. 2d 123, 124 (5th Cir. 1980) (collecting cases); *United States* v. *Grande*, 620 F. 2d 1026, 1031 (4th Cir. 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Phillips*, 577 F. 2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Harding*, 563 F. 2d 299, 302-307 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F. 2d 1096, 1098-1099 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976). Consistent with the plain language of the Act, these courts have uniformly held that Section 1951 prohibits the taking of property "under color of official right" even absent proof of inducement by actual or threatened force, violence, or fear.

Petitioner contends that at common law extortion "under color of official right" required some kind of affirmative action by the public official, rather than merely passive acceptance of a payment for some unauthorized service or

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[2]We are providing petitioner with a copy of our response in *Butler*.

benefit conferred. Even the authorities relied on by petitioner establish, however, that common law extortion under color of official right included both "demanding" money and "taking" money if the defendant was a public official. See Pet. 11-13; *United States* v. *Laudani*, 134 F. 2d 847, 851 n.1 (3d Cir. 1943). Likewise, although petitioner asserts that the Sixth Circuit has incorrectly held in his case that extortion and bribery are not mutually exclusive, the courts of appeals have uniformly rejected that claim.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

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[3]In addition to the cases cited above, see *United States* v. *Brown*, 540 F. 2d 364, 371-372 (8th Cir. 1976) and *United States* v. *Braasch*, 505 F. 2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).